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IN THE SUPREME COURT OF THE STATE OF IDAHO

COPY

JONATHON GEORGE PLASTER, JR.,)	
)	No. 41780
Petitioner-Appellant,)	
)	Cassia Co. Case No.
vs.)	CV-2013-799
)	
STATE OF IDAHO,)	
)	
Respondent.)	

BRIEF OF RESPONDENT

APPEAL FROM THE DISTRICT COURT OF THE FIFTH JUDICIAL
DISTRICT OF THE STATE OF IDAHO, IN AND FOR THE
COUNTY OF CASSIA

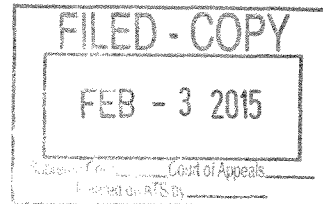
HONORABLE MICHAEL R. CRABTREE
District Judge

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PETITIONER-APPELLANT

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STATEMENT OF THE CASE

Nature Of The Case

Jonathan George Plaster, Jr., appeals from the judgment entered following the district court's order summarily dismissing his successive post-conviction petition.

Statement Of Facts And Course Of The Proceedings

In Cassia County Case No. CR-2008-249, Plaster was charged with, and pled guilty to, seven counts of lewd conduct and one count of sexual abuse of a child under sixteen years of age. (See R., p.96.) The court imposed concurrent unified sentences of 40 years with 20 years fixed for the lewd conduct charges and a concurrent 25-year sentence with 20 years fixed for the sexual abuse charge. (See R., pp.96-97.) Plaster appealed and the Idaho Court of Appeals affirmed. (See R., p.97.) The Remittitur in Plaster's direct appeal issued on October 4, 2010. (See R., p.97.)

On May 24, 2011, Plaster filed a timely petition for post-conviction relief in Cassia County Case No. CV-2011-525. (See R., p.97.) The district court summarily dismissed Plaster's post-conviction petition and the Idaho Court of Appeals affirmed "[i]n an unpublished opinion dated July 10, 2013." (See R., p.97.)

On September 5, 2013, Plaster filed a successive petition for post-conviction relief, raising 26 claims. (R., pp.7-55.) Plaster explained his successive petition was "filed due to the fact that [his] Amended Petition for Post Conviction Relief was denied and there was no transcript provided/permitted."

(R., p.7.) Plaster did not request the appointment of counsel to assist him in pursuing his successive petition.¹ (See generally R.; see also R., p.97 (court noting Plaster “did not request the appointment of counsel to represent him”).)

The state filed an answer (R., pp.74-77), and the district court issued a notice of intent to dismiss (“Notice”) (R., pp.96-101). In its Notice, the court advised Plaster it intended to dismiss his successive petition because the petition was not timely filed. (R., p.98.) The court also notified Plaster that any claims based on the proceedings in his initial post-conviction action were not cognizable. (R., pp.100-101.) Plaster filed a response to the Court’s Notice (R., pp.103-108), after which the district court entered an order dismissing Plaster’s successive petition (R., pp.109-113). Plaster filed a timely notice of appeal from the judgment. (R., pp.115-120.)

¹ Plaster did, however, request the appointment of counsel to assist him on appeal. (R., pp.121-124.) The district court granted this request (R., p.132), but appellate counsel was allowed to withdraw after Plaster asked to proceed *pro se* (Motion for Leave to Withdraw as Counsel and Leave to Suspend the Briefing Schedule, filed July 15, 2014; Order Granting Motion for Leave to Withdraw and to Suspend the Briefing Schedule, dated August 8, 2014).

ISSUE

Plaster's brief does not contain a statement of issues on appeal as required by I.A.R. 35(a)(4). The state phrases the issue as:

Has Plaster failed to establish that the district court erred in summarily dismissing his untimely successive petition for post-conviction relief?

ARGUMENT

Plaster Has Failed To Show Error In The Summary Dismissal Of His Untimely Successive Petition For Post-Conviction Relief

A. Introduction

Plaster filed his successive petition for post-conviction more than one year after his conviction became final. (R., p.7; see p.97.) The district court concluded that Plaster's successive petition should be dismissed because it was untimely. (R., pp.96-101, 109-113.) On appeal, Plaster claims the district court erred in dismissing his petition based on timeliness because, he asserts, he has a "sufficient reason" for filing his untimely successive petition and that his successive petition relates back to the date he filed his original petition. (Appellant's Brief, p.4.) Plaster's claim fails because he has failed to articulate any legitimate basis from which the district court could find his petition was timely filed. Plaster has therefore failed to show the district court erred in summarily dismissing his untimely successive petition for post-conviction relief.

B. Standard Of Review

This Court freely reviews the district court's application of the statute of limitation to a post-conviction petition. Schwartz v. State, 145 Idaho 186, 189, 177 P.3d 400, 403 (Ct. App. 2008) (citing Freeman v. State, 122 Idaho 627, 628, 836 P.2d 1088, 1089 (Ct. App. 1992)).

C. The District Court Correctly Dismissed Plaster's Successive Petition As Untimely

Idaho Code § 19-4902(a) requires that a post-conviction proceeding be commenced by filing a petition "any time within one (1) year from the expiration of the time for appeal or from the determination of an appeal or from the determination of proceedings following an appeal, whichever is later." The failure to file a timely post-conviction petition is a basis for dismissal. Schwartz, 145 Idaho at 189, 177 P.3d at 403 (citing Sayas v. State, 139 Idaho 957, 959, 88 P.3d 776, 778 (Ct. App. 2003)). In the case of successive petitions, the Idaho Supreme Court has "recognized that rigid application of I.C. § 19-4902 would preclude courts from considering 'claims which simply are not known to the defendant within the time limit, yet raise important due process issues.'" Rhoades v. State, 148 Idaho 247, 250, 220 P.3d 1066, 1069 (2009) (quoting Charboneau v. State, 144 Idaho 900, 904, 174 P.3d 870, 874 (2007)). Absent a showing by the petitioner that the limitation period should be tolled, the failure to file a timely petition for post-conviction relief is a basis for dismissal of the petition. Rhoades, 148 Idaho 247, 220 P.3d 1066; Evensiosky v. State, 136 Idaho 189, 30 P.3d 967 (2001); Kriebel v. State, 148 Idaho 188, 190, 219 P.3d 1204, 1206 (Ct. App. 2009).

Plaster did not file his successive post-conviction petition until September 5, 2013 (R., p.7), nearly three years after the October 4, 2010 Remittitur issued in his direct appeal (see R., p.97). Plaster's successive petition was, therefore, clearly untimely based on the one-year statute of limitation. Plaster does not dispute this conclusion, but claims he has a "sufficient reason" for filing a

successive petition under I.C. § 19-4908 and that his successive petition relates back to the date of his original petition. (Appellant's Brief, p.4.) Plaster's arguments fail.

Plaster's reliance on the sufficient reason standard for filing a successive petition under I.C. § 19-4908 is misplaced because it does not resolve the question of whether Plaster's successive petition was timely filed. That Plaster believes he has a sufficient reason that would allow him to file a successive petition does not mean he timely filed his successive petition. While a petitioner may have a legally sufficient reason for filing a successive petition, the petition must still be timely. Charboneau, 144 Idaho at 904-905, 174 P.3d at 874-875. The relevant inquiry in deciding if Plaster's successive petition was timely filed requires consideration of whether Plaster filed his successive petition within a reasonable time of when the claims raised in the petition were known or reasonably could have been known. Id. at 904, 174 P.3d at 874. What constitutes a reasonable time is analyzed on a "case-by-case basis." Id.

Plaster characterizes the claims in his successive petition as "nearly mirror[ing] those" raised in the amended petition he filed in his first post-conviction case. (Appellant's Brief, p.4.) Thus, Plaster's successive petition claims were known during his first post-conviction proceedings, which forecloses any assertion that he is not bound by the one-year limitation period set forth in I.C. § 19-4902(a). Plaster's reliance on the relation back doctrine is consistent with this point, although Plaster is not entitled to relate the filing date of his successive petition back to the date he attempted to amend his initial petition.

In Hernandez v. State, 133 Idaho 794, 992 P.2d 789 (Ct. App. 1999), the Court of Appeals applied the relation back theory to allow the petitioner to timely file a successive petition to litigate claims that were inadequately raised in the initial petition because post-conviction counsel was ineffective. The continuing viability of Hernandez in terms of application of the relation back doctrine is, however, questionable in light of the Idaho Supreme Court's recent opinion in Murphy v. State, 156 Idaho 389, 391, 327 P.3d 365, 367 (2014), in which the Court foreclosed the possibility that ineffective assistance of post-conviction counsel can qualify as a sufficient reason "under I.C. § 19-4908 for allowing a successive petition."

Even if the relation back theory as applied in Hernandez is still viable, it would not benefit Plaster in this case because the claims he raised in the amended petition he filed in his first post-conviction action that he attempts to reassert in his successive petition were not dismissed due to any alleged ineffective assistance of counsel. Instead, the claims were never considered because Plaster was never given leave to amend his initial petition. (See R., p.110; #40193 R.², pp.142-143.) To the extent Plaster believes the district court erred in not considering the claims he alleged in the amended petition he filed in his first post-conviction case, he should have raised that claim on the appeal from the court's summary dismissal order; he did not. See Plaster v. State, Docket No. 40193, 2013 Unpublished Opinion No. 576 (Idaho App. July 10,

² Contemporaneous with this brief, the state filed a motion to take judicial notice of the Clerk's Record prepared in relation to Plaster's first post-conviction appeal, Plaster v. State, Docket No. 40193.

2013) (appeal from district court order summarily dismissing first post-conviction petition, challenging district court's denial of discovery requests). The district court's failure to consider the claims in Plaster's amended petition, filed in his first post-conviction case, does not justify application of the relation back doctrine with respect to his successive petition.


Applying the reasonable time standard to the timing of Plaster's successive petition (as opposed to the relation back doctrine), as required by Charboneau, Plaster did not file his successive petition within a reasonable time of learning that the claims he alleges in his successive petition were not considered in his original post-conviction case. The district court summarily dismissed Plaster's first post-conviction petition on June 7, 2012. (#40193 R., pp.141-151.) Plaster did not file his successive petition until more than 14 months later. (R., p.7 (successive petition filed September 5, 2013).) Fourteen months is not a reasonable time. Compare Charboneau, 144 Idaho at 905, 174 P.3d at 875 (holding that 13 months "is simply too long a period of time to be reasonable").

Plaster has failed to establish he is entitled to application of the relation back doctrine or that he filed his successive petition within a reasonable time. Plaster has therefore failed to show the district court erred in dismissing his successive petition as untimely.

CONCLUSION

The state respectfully requests this Court affirm the district court's summary dismissal of Plaster's untimely successive petition for post-conviction relief.

DATED this 3rd day of February 2015.



JESSICA M. LORELLO
Deputy Attorney General

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 3rd day of February 2015 I caused two true and correct copies of the foregoing RESPONDENT'S BRIEF to be placed in the United States mail, postage prepaid, addressed to:

JONATHON GEORGE PLASTER, JR.
IDOC #81349
PO Box 14 - Unit 16
Boise, ID 83707



JESSICA M. LORELLO
Deputy Attorney General

